

**UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C.**

REVIEW OF NONPOSTAL SERVICES

DOCKET NO. MC2008-1 (PHASE IIR)

**COMMENTS OF LEPAGE'S 2000, INC., AND LEPAGE'S
PRODUCTS, INC., TO THE COMMISSION'S NOTICE
AND ORDER ESTABLISHING PROCEDURES ON REMAND**

Respectfully submitted,

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LePage's 2000, Inc., and LePage's Products, Inc. (collectively, "LePage's"), submit the following comments in response to the Postal Regulatory Commission's (the "Commission") Notice and Order Establishing Procedures on Remand, Order No. 1043 (the "Remand Order").

INTRODUCTION

The District of Columbia Court of Appeals (the "Court"), in its decision *LePage's 2000, Inc. v. Postal Regulatory Comm'n*, 642 F.3d 225 (D.C. Cir. 2011) ("*LePage's*"), created clear guidelines which the Commission must now follow in order to carry out its duties and obligations under the Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006) (the "PAEA"). Under those guidelines, the only reasonable conclusion the Commission can reach, consistent with its existing findings in the Phase I Order¹, is that the United States Postal Service's (the "Postal Service" or the "USPS") licensing of its brand for use on mailing and shipping supplies sold by private retailers (the "Mailing & Shipping program") is both: (a) a "postal service," not subject to review under the PAEA; and (b) a "nonpostal service" which should be grandfathered under the PAEA because it satisfies an important public need that cannot be met by the private sector.

BACKGROUND

A. THE PAEA

The PAEA is codified at 39 U.S.C. § 404(e). That statute provides:

(e)(1) In this subsection, the term "nonpostal service" means any service that is not a postal service defined under section 102(5).

¹ Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, Order No. 154.

(2) Nothing in this section shall be considered to permit or require that the Postal Service provide any nonpostal service, except that the Postal Service may provide nonpostal services which were offered as of January 1, 2006, as provided under this subsection.

(3) Not later than 2 years after the date of enactment of the Postal Accountability and Enhancement Act, the Postal Regulatory Commission shall review each nonpostal service offered by the Postal Service on the date of enactment of that act and determine whether that nonpostal service shall continue, taking into account--

(A) the public need for the service^[2]; and

(B) the ability of the private sector to meet the public need for the service.^[3]

(4) Any nonpostal service not determined to be continued by the Postal Regulatory Commission under paragraph (3) shall terminate.

(5) If the Postal Regulatory Commission authorizes the Postal Service to continue a nonpostal service under this subsection, the Postal Regulatory Commission shall designate whether the service shall be regulated under this title as a market dominant product, a competitive product, or an experimental product.

39 U.S.C. § 404(e).

B. LEPAGE'S LICENSE AGREEMENT WITH THE POSTAL SERVICE

LePage's is a family-owned minority business enterprise with a warehouse distribution center located in Romulus, Michigan, a suburb of Metro Detroit. *Declaration of Sunir Chandaria*, ¶¶ 2, 5.⁴ In 2002, LePage's met with the Postal Service to discuss a business collaboration whereby LePage's would sell a new line of mailing and shipping supplies with innovative security features marketed under the USPS brand at private retail outlets. *Id.*, ¶ 9. On January 14, 2005, the parties executed a License

² LePage's refers to this inquiry herein as the "public need" test.

³ LePage's refers to this inquiry herein as the "private sector" test.

⁴ This Declaration was filed with the Commission on July 1, 2010 (redacted version at Filing ID: 68709).

Agreement (the “License Agreement”) which authorizes LePage’s to manufacture and sell to private retail outlets USPS-branded mailing and shipping supplies, including paper mailers, mailing tubes, bubble mailers, mailing boxes, and mail accessories such as tape and labels. See *id.*, ¶ 14 and Exhibit B. Under the License Agreement, the Postal Service “control[s] the nature and quality of all products or services offered for sale under [the] Agreement, the appearance and use of the Licensed Properties, and the appearance and use of all advertising and promotion for the Licensed Articles and/or the Licensed Properties.” License Agreement, Exhibit B, Section 5. The Postal Service must also approve all items before they are sold, and each licensed product must “be of high quality in design, material and workmanship,” and “must be of such style and appearance as to have a positive impact on the USPS” *Id.*, Exhibit D. Each product sold indicates that LePage’s is the manufacturer and that the Postal Service is the licensor.

LePage’s intervened into these proceedings on March 4, 2009 (Filing ID: 62505). After the Commission issued its Phase II Order⁵ requiring the termination of the License Agreement, LePage’s and the Postal Service petitioned the District of Columbia Court of Appeals to review that Order, resulting in the decision *LePage’s 2000, Inc. v. Postal Regulatory Comm’n*, 642 F.3d 225 (D.C. Cir. 2011). LePage’s submits these comments as an intervenor and as an interested party, as the subject of Docket No. MC2008-1 (Phase IIR) directly impacts LePage’s interests.

⁵ Phase II Review of Nonpostal Services Under the Postal Accountability and Enhancement Act, Order No. 392.

C. THE PHASE I AND PHASE II ORDERS

In the Phase I Order, the Commission found that licensing generally “serves the public need which, given the uniqueness of the activity, can not be met by the private sector. ***Accordingly, the Commission finds that licensing, as a general service, should be authorized to continue as a nonpostal service and classified as competitive.***” Phase I Order at 73 (emphasis added). In support of this conclusion, the Commission noted that “[a]side from generating revenues, which make a contribution to institutional costs, benefiting mailers and supporting the Postal Service’s universal service obligation, the Postal Service’s licensing program promotes and gives recognition to its brand.” *Id.* The Commission then noted that these benefits extend to commercial licensing “unrelated to the Postal Service’s operations,” but that commercial licensing “that relate to [the Postal Service’s] operations raise a host of issues” *Id.* at 74. Accordingly, the Commission held that “as an interim measure” it would “grandfather licensing of those products, categorized as Mailing & Shipping, that relate to the Postal Service’s operations, e.g., handling and processing of mail. Consideration of those issues will take place in Phase II of this proceeding.” *Id.* at 74. *See also id.* at 76 (“Under the circumstances, therefore, the Commission will grandfather what the Postal Service has identified as existing Mailing & Shipping commercial licenses pending the outcome of Phase II of this proceeding.”).

In the Phase II Order, the Commission acknowledged the Postal Service’s evidence and arguments in favor of the Mailing & Shipping program, namely that:

licensing which generates revenues and gives recognition to the Postal Service brand serves a public need.... Further, sale of mailing and shipping supplies in nonpostal retail outlets maintains a connection with the Postal Service that leverages the brand, adds convenience for customers, and facilitates and promotes the use of the mail by assisting in

mail preparation. Retail sales of USPS-branded mailing and shipping products are more likely to generate a mailpiece for the Postal Service than a competitor. USPS-branded retail sales also increase the Postal Service's "footprint" and reassure customers of the durability, legibility and quality of the products.... In addition, the Postal Service asserts that if the Postal Service can sell similar products in its own facilities as postal services known as ReadyPost, it makes little sense to deny potential customers who are unable to make a trip to the post office the ability to purchase similar products at other retail locations....

Id. at 12. The Commission concluded, however, that "[a]ny benefits are outweighed by the disadvantages of selling USPS-branded products that can confuse consumers and disrupt markets. Furthermore, the licensing of products that are also regulated by the Postal Service raises a potential for unfair competition that is prohibitive." *Id.* at 15. Based on these concerns, the Commission held that "[t]he licensing of Postal Service branding of mailing and shipping products related to Postal Service operations for general retail distribution is not authorized and shall be terminated pursuant to section 404(e) of the PAEA" *Id.* at 39.

D. THE *LEPAGE*'S DECISION

In *LePage's*, the Court vacated the Phase II Order and remanded proceedings back to the Commission to hold further proceedings consistent with the Court's Order. The Court concluded its decision by noting that "[t]he Commission has much work to do on remand remedying the abundant inconsistencies in its order." *Id.*, 642 F.3d at 234. These inconsistencies include treating the Mailing & Shipping program, which is the program the *LePage's* License arises under, differently from other programs, such as the ReadyPost, Greeting Card, Customized Postage, and Officially Licensed Retail Products ("OLRP") programs, without adequate justification or explanation, and injecting considerations into the PAEA analysis, such as considerations concerning the economic

impact of the Mailing & Shipping program's end products on competitors, which are not justified under the Act.

In addressing LePage's argument that the Commission acted in an arbitrary and capricious manner by finding that the ReadyPost, Greeting Card, and Customized Postage programs are "postal services," but that the Mailing & Shipping program, which provides similar benefits, is not, the Court agreed, holding that:

Distinguishing the [Mailing & Shipping] program from ReadyPost and the greeting card program based on the rationale offered below (to the extent the Commission still relies on it) is untenable. The Commission found ReadyPost and the greeting card program to be "postal services" because these products fostered use of the mail and enhanced consumers' convenience. Yet, as LePage's and the Service persuasively argue, these articulated factors apply to the [Mailing & Shipping] program as well. The [Mailing & Shipping] program products—indistinguishable from the ReadyPost products ... —meet customers' mailing needs, make access to the mailstream easier, and, because they are available in [] many retail establishments, improve customer convenience. We remand the Phase II order to the Commission to explain its departure from the Phase I order and to adopt a reasoned rationale for classifying the [Mailing & Shipping] program a "nonpostal service."

Id. at 231-32 (footnote omitted). On remand, therefore, the Commission must either designate the Mailing & Shipping program a "postal service," consistent with the Phase I Order, or "adopt a reasoned rationale for classifying the [Mailing & Shipping] program a 'nonpostal service'" which adequately and reasonably distinguishes that program from the ReadyPost, Greeting Card, and Customized Postage programs, which were found to be "postal services" on the ground that they provide benefits which are also provided by the Mailing & Shipping program.

In response to LePage's argument that the Commission acted in an arbitrary and capricious manner by failing to find a public need for the Mailing & Shipping program, the Court again agreed, holding that the Commission's "assessment of the benefits of

the [Mailing & Shipping] program is flawed.” *Id.* at 232. The Court noted how, in the Phase I Order, “the Commission determined that commercial licensing, as a general matter, served a public need because it generated revenue, benefited mailers, and gave recognition to the Service’s brand ... and [i]n its Phase II order, the Commission again recognized these benefits,” based on evidence submitted by the Postal Service, yet the Commission refused to acknowledge these benefits for the Mailing & Shipping program, despite the fact that the evidence in the record related to all aspects of commercial licensing and thus necessarily applied to the Mailing & Shipping program as well. *Id.* The Court also found that the Commission acted arbitrarily and capriciously by refusing to acknowledge that the benefits of the OLRP program also applied to the Mailing & Shipping program, *id.*, and found that the factors the Commission had relied on to reject the Mailing & Shipping program likely were not proper considerations under the Act. *Id.* (“[t]he Act requires the Commission to assess the ‘public need’ for the service ‘offered by’ the Postal Service.... Yet the service offered by the Postal Service in the [Mailing & Shipping] program is, of course, the licensing of intellectual property. The Commission’s focus on the economic effect of the products that result from licensing, then, would seem to depart from the Act’s plain language.”).

Lastly, the Court affirmed LePage’s argument that the Commission’s finding that the Mailing & Shipping program does not satisfy the “private sector” test impermissibly contradicted the Commission’s earlier finding that licensing is a service that cannot be provided by the private sector. In reaching this conclusion, the Court not only criticized the Commission for departing from its prior precedent, but it went further and noted that “under the Act, the Commission must assess the activity the Service offers. In the case

of commercial licensing—whether for mailing and shipping supplies or for other products—***that activity is licensing***. Therefore, ***for the Commission to review the private sector factor by assessing ability of the private sector to provide similar products would bring the Commission into conflict ... with the Act***” *Id.* at 233-34 (emphasis added). In other words, in assessing the “private sector” test, the Commission may not assess the private sector’s ability to provide similar products, but rather must focus on the private sector’s ability to license the Postal Service brand (something which the private sector obviously cannot do).

The Commission’s task in Docket No. MC2008-1 (Phase IIR), therefore, is first to determine whether the Mailing & Shipping program is a “postal service” given its similarity to numerous other programs that were deemed to be “postal services” by the Commission, and if not, whether the program merits grandfathering by assessing whether licensing serves a public need that cannot be met by the private sector. This second inquiry should be limited, however, because the Commission has already found that licensing (the only activity the Court held is the proper subject of review for the Mailing & Shipping program) satisfies both tests. Moreover, the Court has cautioned that the Commission’s findings: (a) must be reasoned and based on an analysis that does not unjustifiably treat the Mailing and Shipping program differently from other similar programs; (b) must be based on findings that are supported by the evidence in the record; and (c) must be based on an analysis of the benefits of licensing, not on an analysis which focuses on the quality, nature, or characteristics of the products sold by private parties as a result of the licensing arrangement (and thus the Commission’s

analysis cannot be based on considerations concerning whether the *products* sold by private parties confuse consumers or unfairly distort markets).

DISCUSSION

A. THE MAILING & SHIPPING PROGRAM SHOULD BE CLASSIFIED AS A “POSTAL SERVICE”

The Commission should classify the Mailing & Shipping program a “postal service” because this program is substantially similar to the ReadyPost, Greeting Card, and Customized Postage programs,⁶ all of which were found to be “postal services” by the Commission, and all of which involve the licensing of the USPS brand for use on postal related products in one form or another.

1. The Commission’s Definition of the Term “Postal Service”

The PAEA, at 39 U.S.C. § 404(e)(1), provides that, “[i]n this subsection, the term ‘nonpostal service’ means any service that is not a postal service defined under section 102(5).” Section 102(5), in turn, states that the term “‘postal service’ refers to the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto” 39 U.S.C. § 102(5). See *also* 39 C.F.R. § 3001.5(s) (adopting the same definition). In the Phase I Order, the Commission held:

Thus, if a service relates to any of these functions, broadly, the carriage of mail, it may properly be classified as a postal service. It may also be classified as a postal service if it serves “other functions ancillary” to the carriage of mail.... The term “ancillary” means auxiliary, subordinate, or subsidiary.

Phase I Order at 30 (footnote omitted).

The term “postal service” was further defined in the Phase I Order when the

⁶ Each of these services is described in the Phase I Order at 32-36.

Commission evaluated whether the ReadyPost, Greeting Card, and Customized Postage programs are “postal services.” In that Order, the Commission held that those programs are “postal services” because they “meet customers’ mailing needs, make access to the mailstream easier, and, because they are available in [] many retail establishments, improve customer convenience.” *LePage’s*, 642 F.3d at 231-32. See also Phase I Order at 33-36. In reaching this conclusion, the Commission cited *Associated Third Class Mail Users v. U.S. Postal Service*, 405 F. Supp. 1109 (D.D.C. 1975). In that case, the court held that the provision of money orders is a postal service because, although “they can be used equally well without being delivered by mail,” “it does seem that the vast majority of money orders sold at post offices are actually sent by mail.” *Id.* at 1115.⁷

If a service is a “postal service,” then it is not subject to termination under the PAEA. See 39 U.S.C. § 404(e)(4) (“Any *nonpostal service* not determined to be continued by the Postal Regulatory Commission under paragraph (3) shall terminate.”) (emphasis added). See also Phase I Order at 2 (holding that if a “revenue-generating activity” is “postal,” then the Commission’s role is to hold “a proceeding to add the service to the Mail Classification Schedule,” and not to conduct the analysis set forth in 39 U.S.C. § 404(e)(3)).

Under the definition of the term “postal service” set forth in Section 102(5), as interpreted by the Commission, the Mailing & Shipping program is a “postal service” because the program is designed to generate parcels to be mailed via the Postal

⁷ LePage’s is prepared to gather and present evidence that USPS-branded boxes and envelopes not only are purchased with the intent of being mailed, but that its USPS-branded products enter the mailstream at a greater rate than greeting cards sold at Post Offices, which are considered “postal services.”

Service. As such, the program: (a) relates to the carriage of mail; (b) serves other functions ancillary to the carriage of mail; and (c) meets customers' mailing needs, makes access to the mailstream easier, and, because the program's products are available in many retail establishments, the program improves customer convenience. Indeed, on remand, LePage's is prepared to offer evidence to corroborate the commonsense notion that consumers buy USPS-branded envelopes and boxes for the purpose of mailing them.

2. The Mailing & Shipping Program Provides the Same Benefits as the ReadyPost, Greeting Card, and Customized Postage Programs

In the Phase I Order, the Commission found that the ReadyPost, Greeting Card, and Customized Postage programs - all of which involve licensing of the USPS brand and intellectual property - are "postal services" because those programs help generate mail. In particular, in determining that the ReadyPost program - which involves the following three components: (a) licensing the Postal Service brand to Hallmark Custom Marketing; (b) the production by Hallmark Custom Marketing of ReadyPost mailing and shipping supplies; and (c) the sale of ReadyPost mailing and shipping supplies at Postal Retail outlets, online at The Postal Store (<https://shop.usps.com>), and at privately-operated Contract Postal Units ("CPUs") - is a "postal service," the Commission made the following findings:

First, it is likely that most ReadyPost products are mailed.... Second, ReadyPost product lines, which are available in post offices, are designed to meet customers' mailing needs. They offer customers a degree of assurance that such products will meet the packaging and labeling requirements of the Postal Service. Moreover, from the Postal Service's perspective, use of approved packaging and labels should lower the Postal Service's handling and transportation costs, *e.g.*, through reduced breakage and ease of readability. Third, making these postal-related products available at retail outlets offers convenience to the customer and makes access to the mailstream easier. In sum, ReadyPost can

reasonably be viewed as ancillary to the carriage of mail. Therefore, for the foregoing reasons, the Commission finds ReadyPost to be a postal service....

Phase I Order at 33.

Similarly, in finding that the Greeting Card Program - a program involving the sale of USPS-branded and non-branded greeting cards by the Postal Service both at postal retail outlets and online at shop.usps.com - is a postal service, the Commission made the following findings:

At bottom, the cards and related integrated retail promotions sold at retail facilities or online are designed to foster the use of the mails. The Postal Service represents that most cards are mailed. Greeting cards are a particularly valued form of personal communications commemorating special events in peoples' lives. In that regard, greeting cards serve to bind the Nation together through personal correspondence, a basic function of the Postal Service. 39 U.S.C. § 101(a). In addition, greeting cards offer benefits similar to those ascribed to ReadyPost, e.g., customer convenience, and a degree of assurance that such products satisfy the Postal Service's processing requirements. Finally, no party objects to classifying greeting cards as a postal service.

For these reasons, the Commission concludes that, under the PAEA, greeting cards and stationery may be classified as a competitive postal service subject to the outcome of the pending classification proceeding.

Id. at 34-35.

Lastly, with regard to the Customized Postage Program, a program whereby the USPS licenses its intellectual property to third party vendors such as Stamps.com, Endicia, Pitney Bowes, and Zazzle.com, who, in turn, sell customized postage products bearing a consumer's desired design or photograph, the Commission found this program to be a "postal service" for the following reasons:

Customized Postage, which may be used in lieu of other forms of postage, is produced by private companies licensed by the Postal Service using PC Postage technology. Although not a postage stamp, Customized Postage includes a customer-supplied image and a state-of-the-art secure barcode

that helps ensure protection of Postal Service revenue.... Customers of an authorized Customized Postage vendor may obtain Postal Service-authorized postage consisting of customer specific, customer-supplied images aligned with Postal Service-approved indicia of postage payment. The postage meter is a forerunner to Customized Postage.

Customized Postage providers must be an authorized PC Postage provider, authorized postage meter manufacturer or distributor, or a company affiliated with an authorized postage provider under conditions prescribed by the Postal Service to assure revenue security. Currently, the Postal Service has agreements with four authorized Customized Postage providers.... The only revenue the Postal Service receives is in the form of a participation fee. The providers set the price paid by their customers, which is an amount greater than the face value of the postage required to mail the item....

In its simplest terms, Customized Postage represents a form of postage prepayment, a core function of the Postal Service. See 39 U.S.C. §§ 404(a)(2) and (a)(5). In that regard, it is indistinguishable from the prepayment of postage via postage meters, a long-recognized special postal service. The payment of postage is a prerequisite to the carriage of mail. Without it, service is not possible. Accordingly, customized postage is a postal service.....

Id. at 35-36. See also *LePage's*, 642 F.3d at 227 and 231 (explaining the Commission's justification for classifying each of these programs as "postal services").

In *LePage's*, the Court held that "these articulated factors apply to the [Mailing & Shipping] program as well. The [Mailing & Shipping] program products - indistinguishable from the ReadyPost products, ... - meet customers' mailing needs, make access to the mailstream easier, and, because they are available in [] many retail establishments, improve customer convenience." *Id.* at 231-32. The Court further noted that the category of mailing and shipping supplies "includes products related to the Service's core business of delivering the mail." *Id.* at 226. The Court then found the Commission's refusal to find that the Mailing & Shipping program meets the definition of "postal service" to be arbitrary and capricious given the program's similarity to the

ReadyPost program (among other reasons), and it remanded this issue to the Commission to “explain its departure from the Phase I order and to adopt a reasoned rationale for classifying the [Mailing & Shipping] program a ‘nonpostal service.’” *Id.* at 232.

As things presently stand, the Commission has previously found that a program that meets customer mailing needs, makes access to the mailstream easier, and improves customer convenience is a “postal service.” And the Court expressly found that the Mailing & Shipping program provides these precise benefits. On remand, therefore, the Commission can either find that the Mailing & Shipping program is a “postal service” because it satisfies the existing definition of that term, or it can seek to redefine the term “postal service,” in which case it will be necessary for the Commission to reevaluate every service already considered by the Commission in this proceeding in order to determine whether that service meets the new definition of the term.

3. In Determining Whether an Activity is a “Postal Service,” the Commission Must Apply the Same Test to Every Service

Before the Court, the Commission argued that LePage’s comparison between the Mailing & Shipping program and the ReadyPost, Greeting Card, and Customized Postage programs was inapt because, under the PAEA, the proper focus is on “each activity ‘*offered by*’ the Service to determine if it is ‘postal’ or ‘nonpostal.’ ... [And] [w]ith regard to the [Mailing & Shipping] program, the only activity ‘offered by’ the Service is licensing By contrast, ReadyPost and the greeting card program are ‘postal services’ because in each case the Service sells mailing and shipping supplies at its retail locations and on its website.” *Id.* at 231 (citation omitted). In response, the Court noted that this position “is inconsistent with the position [the Commission] took below,

where it assessed whether the *products* at issue - as opposed to the activity offered by the Service - could ‘reasonably be viewed as ancillary to the carriage of mail.’ *Id.* (citing the Phase I Order at 33). The Court then ordered the Commission “to explain its departure from the Phase I order” *Id.* at 232.

In *LePage’s*, the Court did not adopt the Commission’s argument that in assessing whether something is a “postal service” the proper focus is on “each activity ‘offered by’ the Service ...” *id.* at 231, although it did require this analysis when conducting the “nonpostal service” analysis set forth in Section 404(e)(3), *see id.* at 233-34.⁸ But the Court did expressly prohibit using one test for one program and a separate test for another program without a reasoned explanation for the distinction. Thus, if the Commission takes the position on remand that it may only review the activity “offered by” the Postal Service in determining what constitutes a “postal service,” then the only activities “offered by” the Postal Service with regard to the ReadyPost and Greeting Card programs are *licensing* and *selling*, each of which would have to be examined independently to determine if that particular activity is a “postal service.” In other words, both licensing *and* selling would have to be “postal services” in order for the ReadyPost and Greeting Card programs to be deemed “postal services.” With regard to the Customized Postage Program, the only activity “offered by” the Postal Service is

⁸ Section 404(e)(3) requires the Commission to review “each nonpostal service **offered by the Postal Service** ... and determine whether that nonpostal service shall continue, taking into account -- (A) the public need for the service; and (B) the ability of the private sector to meet the public need for the service.” *Id.* (emphasis added). Based on this language, the Court held that the only proper inquiry under Section 404(e)(3) is on the activity *offered by* the Postal Service. *See LePage’s*, 642 F.3d at 233-34. The term “offered by” is not part of the definition of “postal service” set forth in 39 U.S.C. § 102(5), however, which defines the term to mean “the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto” Because the term “offered by” does not appear in Section 102(5), then in conducting the Section 102(5) analysis it would appear to be permissible - as the Commission did in the Phase I Order - to look beyond the service “offered by” the Postal Service in order to determine if the requisite nexus to the carriage of the mail exists.

licensing, so in order for that program to be a “postal service” licensing must be a “postal service.”

What the Commission may not do, however, is find that one definition of “postal service” applies to the ReadyPost, Greeting Card, and Customized Postage programs, but then in the same proceeding find that a separate definition applies to the Mailing & Shipping program. That is what the Commission attempted to do in the Phase II Order, and the Court rejected this approach.

4. The Postal Selling Versus Private Selling Distinction Drawn By the Commission is Inconsistent With the Phase I Order, Section 102(5), and the Factual Record

The next distinction the Commission attempted to draw before the Court to distinguish the ReadyPost, Greeting Card, and Customized Postage programs from the Mailing & Shipping program is the fact that the ReadyPost and Greeting Card programs are sold by the Postal Service. See *id.* at 231 (“ReadyPost and the greeting card programs are ‘postal services’ because in each case the Service sells mailing and shipping supplies at its retail locations and on its website.... In other words, the Commission seems to assert that so long as it is the Service itself that sells mailing and shipping supplies, it is a ‘postal service.’”). This distinction would not, however, apply to the Customized Postage program, which is sold by third parties.

But the Commission has never found that Postal Service selling renders something a “postal service,” or explained how this distinction comports with Section 102(5). To the contrary, the Commission has expressly found that this distinction does not comport with Section 102(5) and that some actual nexus to the carriage of the mail

is required.⁹ For instance, in the Phase I Order the Commission held that the sale of music CDs, as part of the Greeting Card program, was not a “postal service,” unless the CDs related to a stamp. The Phase I Order states, “[h]owever, the Postal Store, accessible through the Postal Service website, appears to be selling a number of popular music CDs that are not obviously related to any stamp. Sales of CDs do not appear likely to be a postal service, and are not authorized as ‘greeting cards.’” *Id.* at 35. Similarly, the Commission found that a number of other activities engaged in by the Postal Service were not “postal services,” even though the Postal Service was directly selling the product. With regard to the OLRP program, whereby the Postal Service “sells officially licensed retail products ... in post offices ... [a]ll ... bear[ing] postal branding, trademarks, or other intellectual property,” the Commission found that this program “is not a postal service” (although it could be a “postal service” if the products being sold are ancillary to the carriage of the mail). *Id.* at 48-49.¹⁰ The Commission also held that the sale of passport photos at Post Offices “does not qualify as a postal

⁹ The Postal Service has also rejected this distinction. In the Postal Service’s Response to Presiding Officer’s Information Request No. 1, the Postal Service responded as follows to the following question from the Commission:

Question: With respect to the sale of items by the Postal Service: Is it the Postal Service’s position that it may sell any item as a postal service provided the item is sold at a retail postal facility including, without limitation, main post office, station, branch, or contract unit?

Answer: No, it is not the Postal Service’s position that an item is properly deemed a “postal service” under the statutory meaning of the term simply because the Postal Service wishes to sell that item through its retail channels.

Id.

¹⁰ Recognizing that the OLRP program bears a striking resemblance to the ReadyPost program with regard to the “Ancillary Services” prong of the OLRP program (involving the sale of “a variety of postal branded items that assist mailers in the use of the postal services, e.g., scales, stamp dispensers, and passport holders” - Phase I Order at 48), the Commission allowed that “[t]hose products described as ancillary by the Postal Service could, arguably, be considered postal services. Since no party advocates that treatment, the Commission finds it unnecessary to address it.” *Id.* at note 93.

service,” Phase I Order at 41, and that the sale of photocopy services at Post Offices “is a service and is not a postal service,” *id.* at 44. Likewise, the provision of notary public services at Post Offices “is a service; it is not a postal service.” *Id.* at 45. Thus, given that the Commission has already found that the fact that the Postal Service sells something does not make it a “postal service,” and reference to the actual product being sold is required, if the Commission desires to continue to draw this distinction to differentiate the ReadyPost and Greeting Card programs from the Mailing & Shipping program, it will have to explain the basis for its departure from this established precedent.

The Commission will also have to explain how a program such as the Customized Postage program, which involves no selling on the part of the Postal Service, can be deemed a “postal service,” when the only activity engaged in by the Postal Service in connection with that program is licensing. (Under this program, the end product “is produced by private companies licensed by the Postal Service,” and is sold by third-party vendors, not by the Postal Service. See *id.* at 35-36.) In fact, by finding that the Customized Postage program is a “postal service,” the Commission has already concluded that a licensing arrangement can be a postal service if the end product being sold is ancillary to and/or relates to the carriage of the mail. Because the Mailing & Shipping program also involves a licensing arrangement for an end product that is ancillary to and/or related to the carriage of the mail, it too should be designated a “postal service.”

Additionally, if the Commission seeks to adopt the private-selling versus public-selling distinction, it will not be enough for the Commission to simply articulate the

reasoned basis for its departure from the Phase I Order; rather, in order for this distinction to pass muster it must also be supported by the text of Section 102(5). Section 102(5) states that the term “‘postal service’ refers to the delivery of letters, printed matter, or mailable packages, including acceptance, collection, sorting, transportation, or other functions ancillary thereto” 39 U.S.C. § 102(5). The notion that direct sales by the Postal Service is the determinative factor in rendering something a “postal service” is simply not supported by this language, which requires a nexus between the service and the acceptance, collection, and/or delivery of the mail.

In order to distinguish ReadyPost from the Mailing & Shipping program on the basis that one is sold by the Postal Service and one is not, the distinction must also be factually correct. The Commission will again run into difficulties in this regard because, as a factual matter, ReadyPost products are sold not just directly by the Postal Service, but also by private parties at privately-operated CPUs.¹¹ Thus, it is not even factually correct to argue that ReadyPost products are exclusively sold by the Postal Service. Similarly, a consumer shopping at <https://shop.usps.com> who seeks to buy a Prepaid Forever Priority Mail Flat Rate Package is redirected to a site with the domain <https://uspsstore.stamps.com/> which bears the Postal Service logo but indicates that it is “powered by Stamps.com” and the sale is apparently fulfilled by Stamps.com. The line between what constitutes a Postal Service sale versus a private sale is therefore not as clear as the Commission appears to suggest. Along this same continuum, sales

¹¹ See https://www.fbo.gov/index?s=opportunity&mode=form&id=bffb1a11c3eb348d9468a7885b2190&tab=core&_cview=0 (USPS Packaging Products Supply Chain Improvement Initiative, Solicitation Number 2D-12-A-0016) (discussing that “ReadyPost® products are distributed directly to individual USPS retail locations, **including Contract Postal Units (CPUs)**.”) (emphasis added). See also <http://about.usps.com/suppliers/becoming/contract-postal-unit.htm> (describing that “A Contract Postal Unit (CPU) is a **supplier**-owned or **supplier**-leased site operated by the **supplier**, under contract to the Postal Service™ to provide postal services to the public at Postal prices.”) (emphasis in original).

of products under the Mailing & Shipping program are not completely private because the sales are controlled to a certain degree by the Postal Service, and the Postal Service generates revenue from each sale. Indeed, by authorizing a private party (*i.e.*, LePage's) to sell USPS branded mailing and shipping supplies, the Postal Service is, to some degree, simply allowing a private party to sell products on its behalf. This arrangement is indistinguishable from ReadyPost sales at CPUs. In both instances, through licensing arrangements, USPS branded products are sold by private parties.

Moreover, even if the Commission could distinguish ReadyPost from the Mailing & Shipping program on the ground that one is sold by the Postal Service and one is sold by private parties (and, as noted above, it does not appear that this distinction is even factually correct), it is not enough that the distinction exists, the distinction must be rational and must be consistent with the definition of the term "postal service."¹² Indeed, the Court expressly ordered the Commission, on remand, to "adopt a reasoned rationale for classifying the [Mailing and Shipping] program a 'nonpostal service.'" *LePage's*, 642 F.3d at 232. The fact that the ReadyPost program involves sales by private parties at CPUs (which may be operated in the same retail establishment that is selling Mailing & Shipping products) precludes the Commission from supplying the reasoned rationale the Court has required.

¹² While a cursory reading of *LePage's* may appear to suggest that the Court somehow endorsed this distinction, that is not the case. To the contrary, the Court expressly declined to take a view on this position. See *id.* ("But whatever the merits of this position, we cannot consider it because the Commission did not set it forth below."). Additionally, the Court noted that this distinction "is inconsistent with the position it took below, where it assessed whether the *products* at issue - as opposed to the activity offered by the Service - could 'reasonably be viewed as ancillary to the carriage of mail.'" *Id.* (citing Phase I Order at 33).

5. The Public/Private Selling Distinction is Inconsistent with the Postal Service's Objectives and Future Plans for Growth and Economic Viability

The public/private selling distinction is also harmful to the Postal Service's long-term needs. In virtually all strategic planning publications generated by and for the Postal Service in the last ten years, the Postal Service has stressed the need to reduce infrastructure costs while at the same time expand access to its services. See 2002 Transformation Plan at 13¹³ ("The Postal Service's major retail challenge is to meet its customers' ever-increasing needs for access while reducing infrastructure and operating costs."). For instance, in the 2002 Transformation Plan the Postal Service expressed frustration with the fact that 31% of customers who visit postal retail outlets do so simply to purchase stamps, despite the existence of "several underutilized alternative channels," which are "less expensive for the Postal Service," including "[l]imited counter services ... at more than 4,400 privately operated contract retail units." *Id.* at 13. As part of this transformation plan, the Postal Service endeavored to "provide customers with easier and more convenient retail access" to basic postal services and to provide these services "where customers need them -- at home, at work, where they shop, or at the post office." *Id.*¹⁴

More recently, the Postal Service has issued a number of press releases explaining that it is shifting its focus away from the retail post office. As one recent release put it, "It's not about brick-and-mortar Post Offices anymore, as postal products

¹³ Portions of this plan were submitted with the *Declaration of Sunir Chandaria* (Exhibit C), as part of LePage's Submission in Support of USPS' Motion for a Stay of Order No. 392.

¹⁴ These same goals were later reiterated in the USPS's Strategic Transformation Plan for 2006-2010 (*Declaration of Sunir Chandaria*, Exhibit D), and in its report entitled Ensuring a Viable Postal Service for America, and in the accompanying Expanded Access Fact Sheet (both attached to the *Declaration of Sunir Chandaria* as Exhibit F).

move online and into retail outlets, grocery stores, office supply chains and pharmacies. Responding to changing customer needs and a business plan that calls for expanding access to Postal Service products, stores including Costco and Office Depot are offering shipping and mailing services.”¹⁵ The Postal Service further notes in this release that while only 32,000 Post Office locations sell Postal Service products and services, more than 50,000 other locations sell postal products such as stamps. *Id.* Moreover, nearly 35% of the Postal Service’s retail revenue comes from expanded access locations such as Costco, Office Depot, grocery stores, drug stores, APCs, ATMs, and online at USPS.com. *Id.* A subsequent press release describes the Postal Service’s ongoing plan to close up to 3,700 retail post offices.¹⁶ This release explains the diminishing need for the Postal Service’s 32,00 retail outlets, and explains the Postal Service’s plan to replace some of these retail post offices with Village Post Offices which “would be operated by local businesses, such as pharmacies, grocery stores and other appropriate retailers, and would offer popular postal products and services such as stamps and flat-rate packaging.” *Id.* As a Postal Service Fact Sheet explains, “Village Post Offices are part of the Postal Service’s ‘Approved Postal Provider’ network ... [which] are operated by third parties and complement the Postal Service’s own network by offering customers expanded retail access to postal products and services at convenient hours and locations.” *Id.*¹⁷

¹⁵ U.S. Postal Service Expands to 100,000 Locations, Release No. 11-053 (available at: <http://about.usps.com/news/national-releases/2011/pr11_053.htm>).

¹⁶ See Postal Service Takes Next Step in Optimizing Retail Network, Release No. 11-089 (available at <http://about.usps.com/news/national-releases/2011/pr11_089.htm>).

¹⁷ Fact Sheet: Village Post Offices (July 2011) (available at: <<http://about.usps.com/news/electronic-press-kits/expandedaccess/welcome.htm>>).

Another business model the Postal Service is currently exploring as a means to reduce costs while at the same time providing increased customer access where consumers work and shop is through the retail kiosk program. Through this program, a private operator deploys a postal kiosk in a retail location which permits customers to weigh packages, buy postage, and then mail their packages. LePage's, in partnership with Pitney Bowes Inc., has been testing such a program for several years now. As part of this program, LePage's sells its USPS-branded mailing and shipping supplies adjacent to the kiosks. Currently, approximately 70% of the postal services available at a post office are also available at these kiosks. *Declaration of Sunir Chandaria*, ¶ 39. LePage's plans to significantly expand the market penetration of these kiosks over the next four to five years. *Id.*, ¶ 48. This program presents numerous unique benefits to the Postal Service, including the fact that the kiosks are developed, operated, and maintained at the sole cost and expense of the private operator, while at the same time generating easier access to the mailstream for consumers and increasing postal revenue.

Given the recent trend away from the retail post office and towards the provision of postal services at privately-operated retail outlets, it is arbitrary and short-sighted to allow the Postal Service to sell USPS-branded mailing and shipping supplies at retail post offices but not at private retail stores, including stores which run privately-operated postal outlets. Moreover, even if a private retailer does not operate a CPU or similar facility, the Postal Service can encourage the use of such facilities by educating the public that its operations extend beyond brick-and-mortar retail post offices. In this regard, the provision of USPS-branded Mailing & Shipping supplies is ancillary to the

use of privately-operated postal facilities. As the Postal Service explained to the Commission, “[t]he ability to influence behavior in [nonpostal retail] locations, through materials such as the branded products at issue here, is of particular importance as the Postal Service and other parties explore ways to encourage consumers to access postal services in these other locations.” USPS Motion for Reconsideration of Order No. 392 dated July 16, 2010, at 6-7.

The public/private selling distinction was never previously pressed in this proceeding and was never fully examined or explored. For the reasons articulated in this section, the distinction should not be pressed now. In a time when the Postal Service is looking to private partnerships to help reduce costs, increase access to the mailstream, and generate additional parcels for mailing, imposing an arbitrary distinction which limits the Postal Service’s reach to its own facilities is not only unnecessary, but it harms the Postal Service and consumers alike.

6. A More Complete Record is Necessary Before the Commission Can Conclude That the Mailing & Shipping Program is Not a “Postal Service”

In the Phase II Order, the Commission found that the Mailing & Shipping program was distinguishable from the ReadyPost program because, “it is likely that most ReadyPost products are mailed,” and “ReadyPost consists of shipping and mailing supplies designed to meet the public’s immediate mailing needs.” *Id.* at 17 (citing the Phase I Order at 33). In *LePage’s*, the Court held that, “[i]t is of no moment that, as the Commission observed, the [Mailing & Shipping] program may generate less mail for the Service than sales of the same supplies at Service retail locations. A mere comparison of volume cannot save the Commission.” *Id.* at 232 n.5.

To the extent the Commission intends to base its findings on whether the Mailing & Shipping program is a “postal service” by looking at whether that program provides ease of access to the mailstream and/or by looking at how frequently USPS-branded mailing and shipping products sold at private retail outlets are mailed, LePage’s requests the ability to conduct discovery and to introduce evidence addressed to these issues. Limited evidence was produced in the prior proceedings addressed to these issues, and the evidence that was produced was of questionable reliability. For instance, in support of the proposition that LePage’s products are “much less likely to generate mail than purchases at a postal facility,” Phase II Order at 18, the Commission cited “the results of an independent survey of shipping supply purchasers....” *Id.*, n.26. This “independent” survey was conducted by Hallmark, the licensee under the ReadyPost program, and simply asked 510 consumers:

Thinking of your most recent shipping supply purchase at each of the following store(s) [(post office, mailing store, two major discount retailers, drug stores, and office supply stores)], were the shipping supplies that you purchased for a single use or multiple uses?

As this survey did not ask anything about USPS-branded mailing and shipping products, no conclusions can be drawn from this survey regarding how likely it is that a USPS-branded box will be mailed. Thus, to the extent the Commission seeks to draw any conclusions based on how frequently each category of product is mailed, it should conduct discovery addressed to this question.

Likewise, discovery should be conducted to determine how exactly the Mailing & Shipping program differs from the ReadyPost, Greeting Card, and Customized Postage programs, which all involve a form of licensing. As noted previously, it is not the case that ReadyPost products are sold exclusively by the Postal Service, and other Postal

Service programs appear to involve some form of public/private partnership. It is necessary to develop an adequate record on these issues before the public/private distinction can be drawn.

Additionally, in the Phase II Order the Commission found that “[a] fundamental dichotomy exists within the PAEA between postal services such as the sale of ReadyPost packaging at post offices, and the nonpostal service of licensing Postal Service brands for use on retail mailing and shipping products.” *Id.* at 17. But the only distinction the Commission drew to justify this “fundamental dichotomy” was that direct sales “are designed to meet the public’s immediate mailing needs.” *Id.* On remand, if the Commission continues to rely on this public/private sales distinction and continues to justify this distinction on the ground that public sales meet the public’s immediate mailing needs and generate more mail, then LePage’s requests an opportunity to conduct discovery and to present evidence rebutting those conclusions. For instance, LePage’s seeks the opportunity to develop and present evidence showing that its products enter the mailstream at a greater rate than greeting cards purchased at retail post offices, which are often hand-delivered, and showing that its products meet the public’s “immediate mailing needs” much more readily than ReadyPost products purchased online at <https://shop.usps.com>, which by definition do not meet any “immediate mailing needs.”

B. THE PUBLIC NEED FOR LICENSING OF MAILING & SHIPPING PRODUCTS

The Commission should affirm its finding that there is a public need for licensing, and should find that because the Mailing & Shipping program is simply a subset of the Postal Service's licensing program, it too meets the PAEA's "public need" test.

1. The Mailing & Shipping Program Satisfies the "Public Need" Test

Under the PAEA, if a service is found to be a "nonpostal service" that was in existence prior to January 1, 2006 (and there is no dispute that the Mailing & Shipping program was in existence prior to this date), then the Commission must "determine whether that nonpostal service shall continue, taking into account-- (A) the public need for the service; and (B) the ability of the private sector to meet the public need for the service." 39 U.S.C. § 404(e)(3).

In the Phase I Order, the Commission held that "in assessing public need for a specific nonpostal service, the Commission will consider a variety of factors, e.g., the demand for the service, its availability, its usefulness, whether it is a customary business practice, or serves the efficiency of operations." *Id.* at 39. In *LePage's*, the Court also provided useful guidance for conducting the "public need" inquiry, holding that in conducting this inquiry the Commission must focus on the service "offered by" the Postal Service - which in the case of the Mailing & Shipping program is "the licensing of intellectual property" - and not on the products being sold. *Id.*, 642 F.3d at 225. Viewed in this context, the Commission has already concluded that the Mailing & Shipping program satisfies the "public need" test because it already concluded that the service in question - the licensing of intellectual property - serves the public need because it generates revenue and promotes and gives recognition to the Postal Service brand. See Phase I Order at 73.

In the Phase I Order, the Commission also found that the OLRP program meets the “public need” test because it “leverages the Postal Service brand, advertises and enhances its image, and, through the revenues generated, helps support the Postal Service’s core mission.... Like advertising, the OLRP program serves to keep the name of the Postal Service in the minds of potential customers and can serve to increase sales volume to the benefit of the institute and its customers.” *Id.* at 49-50. In *LePage’s*, the Court held that it did “not understand why these same benefits would not accrue to the [Mailing & Shipping] program, which aside from the seller’s identity, is substantially similar to the [OLRP] program.” *Id.*, 642 F.3d at 232. The Court further held that the Commission “must explain this differential treatment of seemingly like cases.” *Id.*

On remand, the Commission should find that, consistent with its findings about commercial licensing generally and the OLRP program specifically, the Mailing & Shipping program satisfies the “public need” test because it “leverages the Postal Service brand, advertises and enhances its image, and, through the revenues generated, helps support the Postal Service’s core mission.... [And] [l]ike advertising, the [Mailing & Shipping] program serves to keep the name of the Postal Service in the minds of potential customers and can serve to increase sales volume to the benefit of the institute and its customers.” Phase I Order at 49-50.

This result is further necessitated by the fact that it is impossible to formulate a reasoned distinction between the “ancillary services” portion of the OLRP program and the Mailing & Shipping program. As the Postal Service explained earlier in this proceeding, it sells two categories of products as part of the OLRP program:

(1) Ancillary services, consisting of a variety of postal branded items that assist mailers in the use of the postal services, e.g., postal-branded mechanical and electronic mailing scales, bottle moisteners, stamp dispensers, and passport photo holders; and

(2) Brand Management, consisting of various other items bearing a postal theme, e.g., teddy bears, pens, and key chains.

Id. at 48-49. OLRP products are sold at postal retail locations, through the USPS's online store (shop.usps.com), and at off-site special events. *See id.* at 49. The Commission cannot reasonably conclude that the sale of USPS-branded "ancillary services" satisfies the "public need" test, but the sale of USPS-branded mailing and shipping supplies does not, because these two programs are virtually indistinguishable - both consist of "postal branded items that assist mailers in the use of postal services." *See Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("an agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard"). *Cf. Airmark Corp. v. Federal Aviation Admin.*, 758 F.2d 685, 691 (D.C. Cir. 1985) ("Deference to agency authority or expertise, however, 'is not a license to ... treat like cases differently.'") (citation omitted).

In carrying out the intent of the PAEA, it is also arbitrary to allow the sale of promotional products, such as USPS-branded key chains and teddy bears, to continue, but to prevent the sale of USPS-branded mailing and shipping supplies which, unlike promotional products, are directly related to the carriage of the mail and which directly serve to generate parcels for mailing. As noted in *USPS v. Postal Regulatory Comm'n*, 599 F.3d 705, 705-06 (D.C. Cir. 2010), the purpose of the PAEA is to exit the Postal Service from business lines wholly unrelated to its core purpose of delivering the mail. Allowing wholly unrelated business lines to continue, but terminating business lines that

are related to the carriage of the mail and that are integral to the Postal Service's future planning goals, is arbitrary and capricious.

2. The Record is Devoid of the Requisite "Substantial Evidence" Showing that the Mailing & Shipping Program Causes Consumer Confusion or is Anti-Competitive

In the Phase II Order, the Commission found that while the Mailing & Shipping program may provide the same benefits as the OLRP program, those benefits "are outweighed by the disadvantages of selling USPS-branded products that can confuse consumers and disrupt markets." Phase II Order at 15. With regard to the consumer confusion issue, however, LePage's noted on appeal, and reasserts, that there is no evidence in the record supporting this finding. To the contrary, in a discovery response submitted by the Postal Service, the Service affirmatively stated that it was unaware of any consumer complaints caused by its commercial licensing program.¹⁸ The Postal Service also disclosed, with regard to the LePage's products, that each product sold indicates that LePage's is the manufacturer and that the Postal Service is the licensor. POIR Response No. 6. Moreover, the Commission's concerns relating to the potential for consumer confusion were addressed and resolved by the Postal Service's representation to the Commission that it was working on modifying its licensed packaging "to indicate the 'Product Guarantee' is the manufacturer's rather than the Postal Service's warranty." Phase II Order at 21. In any event, this factor may no longer be considered by the Commission because, as *LePage's* instructs, "the service

¹⁸ In response to the question: "Aside from this proceeding, has the Postal Service received or been advised of any complaints concerning mailing and shipping products licensed by the United States Postal Service and sold through non-Postal Service retail channels from (a) manufacturers, (b) distributors, (c) retailers, and (d) the general public," the Postal Service responded, "No." See United States Postal Service Response to Presiding Officer's Information Request No. 1. ("POIR Response"), Response No. 16.

offered by the Postal Service in the [Mailing & Shipping] program is, of course, the licensing of intellectual property. The Commission's focus on ... the *products* that result from licensing, then, would seem to depart from the Act's plain language." *Id.*, 642 F.3d at 232. Because the consumer confusion concern focuses on the products being sold, rather than on the service being offered by the Postal Service, it is not a proper consideration under the PAEA.

As for the Commission's concern that the sale of USPS-branded mailing and shipping products "raises a potential for unfair competition that is prohibitive," Phase II Order at 15, that concern was never substantiated with any evidence. To the contrary, all of the evidence in the record addressing that issue relates to the sale of postage meter ink replacement cartridges; there is simply *no* evidence in the record that the sale of USPS-branded mailing and shipping products has resulted in any unfair competition or has disrupted any markets.¹⁹ Indeed, the Commission already acknowledged that "[t]o date, there is no specific allegation of anticompetitive behavior." *Id.* at 22. Furthermore, no competitor before the Commission has, to date, objected to LePage's program. Additionally, it appears that the Commission's concerns - which were not supported by any evidence - regarding the alleged economic advantage created by a manufacturer selling products bearing the USPS-brand may have been overstated. For

¹⁹ There is also no evidence in the record that the Commission's anti-competitive concerns apply with equal force to all of the products sold under the License Agreement. For instance, a flat envelope bears more relation to the mail monopoly than bubble wrap or tape. The Commission's analysis, however, lumps all LePage's products into a single category. The Postal Service advocated for a more targeted review when it argued to the Commission that "the determination whether to allow the current agreements to continue need not necessarily constitute a dichotomous 'yes or no' decision; rather, the Commission can conclude that certain products encompassed by an agreement are authorized to continue, while certain products encompassed by the same agreement should terminate." Further Response of the United States Postal Service to Order Initiating Phase II Proceedings and Notice of Filing of Sworn Statement at 4.

instance, Pitney Bowes Inc., when asked if it desired to license the USPS-brand itself, responded:

Pitney Bowes has invested and succeeded in developing independent brand trust and value over many years of customer service and high-quality products. Accordingly, the USPS-brand is less valuable to Pitney Bowes.

Pitney Bowes Inc. Response to Presiding Officer's Information Request No. 2, Response No. 9. Before the Commission can conclude that the Mailing & Shipping program provides any unfair economic benefits, it must develop a full factual record concerning the value of the Postal Service brand when used on mailing and shipping products (particularly when the products disclose that they are not manufactured and/or warranted by the Postal Service), and the Commission should determine whether that value is fairly offset by the costs of licensing the Postal Service brand.²⁰

It is also factually incorrect, and unsupported by any evidence, that "[t]he Postal Service is a government agency having a monopoly over the carriage of the mail which gives it a perceived expertise over the packaging and preparation of that mail" (Phase II Order at 23), despite the Commission's findings to the contrary in the now-vacated Phase II Order. First, as a legal matter, the postal monopoly is limited to the delivery of non-expedited letters under 12.5 ounces. See 18 U.S.C. § 1696; 39 U.S.C. § 601; 39

²⁰ The Commission should also clarify which specific economic considerations it is concerned with. As the Commission previously noted, competition in and of itself is not objectionable. See Phase II Order at 22 ("it is important to recognize that competition *per se* is not objectionable"). Furthermore, while the PAEA was enacted in response to various criticisms that the Postal Service had entered into a variety of business ventures that were "far afield of its basic function - delivering mail to everyone," *USPS*, 599 F.3d at 706 (citing the report *Embracing the Future: Making the Tough Choices to Preserve Universal Mail Service* (2003)), the concern that was primarily voiced at the time was the use of monopoly profits to cross-subsidize competitive ventures. See *Embracing the Future* at 172 (discussing the need to "ensure[] that rates for competitive products and services are not cross-subsidized by revenues generated by non-competitive products and services.") (available at: <<http://govinfo.library.unt.edu/usps/offices/domestic-finance/usps/pdf/freport.pdf>>). This concern does not apply to the Mailing & Shipping program because that program does not receive any funding from the Postal Service.

C.F.R. Parts 310 and 320. The Commission never conducted any form of review of the types of products actually sold under the Mailing & Shipping program. Had it done so, it would have learned that the vast majority of products sold under this program are not within the postal monopoly (*i.e.*, most mailing and shipping products sold under this program are not envelopes but rather boxes, bubble mailers, and supplies such as packing tape). And there is no evidence in the record suggesting that consumers view a USPS-branded box or tape-roll to be in any way more desirable than a non-branded product, so as to deprive competitors “of the opportunity to compete on a level playing field” Phase II Order at 23. There is not even any evidence in the record concerning how the public perceives the Postal Service brand, much less any evidence that the public perceives that the Postal Service wields some form of expertise over the construction of boxes and packaging tape sufficient to impact the public’s purchasing decisions. To the contrary, the fact that LePage’s only has a 4% market share for the market of tape and mailing products suggests that competitors are not being harmed by the existence of this program.²¹ Without any evidence in the record addressed to these points, however, the Commission may not continue to rely on its “postal monopoly” concerns as a basis for terminating the Mailing & Shipping program.

Similarly, while the Commission expressed concern in the Phase II Order that “when the Postal Service provides regulatory oversight of a product or system, there is the potential for unfair competition,”²² *id.* at 19,²³ it was factually incorrect, and

²¹ See Declaration of Sunir Chandaria, ¶ 45.

²² This concern was initially raised by Pitney Bowes concerning the ink cartridge program, which is in fact subject to regulation, although that regulation does not apply in any way to the Mailing & Shipping program.

unsupported by the evidence, to extend those concerns to the Mailing & Shipping program. As the Postal Service explained to the Commission, it does not exert *any* regulatory control over this class of products, other than creating publicly-available basic mailability standards, which are set forth in the Domestic Mail Manual (“DMM”)²⁴, and which all manufacturers have access to and can comply with (and all major manufacturers do in fact comply with). Aside from the DMM, the Postal Service does not regulate manufacturers of the types of shipping and mailing products at issue in the Mailing & Shipping program. See USPS Response to POIR No. 1, Response No. 3 (Filing ID: 62830). Thus, this “dual regulator” concern also cannot form a basis for distinguishing the Mailing & Shipping program from other programs which the Commission found satisfy the “public need” test.

3. The Commission May Not Rely on Economic Factors as Part of the “Public Need” Inquiry

Even if a sufficient record existed concerning the economic impacts of the Mailing & Shipping program, the Commission may no longer base its “public need” finding on those impacts because the Court has instructed the Commission that its concern about the economic impacts of the Mailing & Shipping program is not a proper line of inquiry under the “public need” test. As the Court held in *LePage’s*, “[w]e find some merit in [the] position ... [that] [t]he Act does not permit the Commission to analyze ‘public need’ based on the predicted economic effects of a product... The Act requires the Commission to assess the ‘public need’ for the service ‘offered by’ the

²³ See *also id.* at 15 (“the licensing of products that are also regulated by the Postal Service raises a potential for unfair competition that is prohibitive.”); and 22 (“the Postal Service’s dual role as regulator and competitor in the same commercial markets creates an inherent conflict of interest and potential for abuse and unfair competition.”) (internal quotation marks and citation omitted).

²⁴ Available at <http://pe.usps.com/text/dmm300/dmm300_landing.htm>.

Postal Service. 39 U.S.C. § 404(e)(3)(A). Yet the service offered by the Postal Service in the [Mailing & Shipping] program is, of course, the licensing of intellectual property. The Commission's focus on the economic effect of the *products* that result from licensing, then, would seem to depart from the Act's plain language." *LePage's*, 642 F.3d at 232. Thus, the Commission may not rely on the perceived economic impacts of the Mailing and Shipping program and must only assess the public need for licensing, which it already found satisfies the "public need" test.

The text of the PAEA also does not suggest that economic factors are meant to play a part in the "public need" analysis. In order to protect competition, Congress required that all grandfathered programs be regulated by the Commission to eliminate anticompetitive effects. See 39 U.S.C. § 404(e)(5) and 39 U.S.C. § 3633. Section 404(e)(5) states, "If the Commission authorizes the Postal Service to continue a nonpostal service under this subsection, the ... Commission shall designate whether the service shall be regulated under this title as a market dominant product, a competitive product, or an experimental product." *Id.* Section 3633 (enacted as part of the PAEA) states, "[t]he ... Commission shall ... promulgate ... regulations to -- (1) prohibit the subsidization of competitive products by market-dominant products; (2) ensure that each competitive product covers its costs attributable; and (3) ensure that all competitive products collectively cover what the Commission determines to be an appropriate share of the institutional costs of the Postal Service." *Id.* These two provisions evidence that Congress viewed competitive concerns as separate from the "public need" test and sought to address those concerns in separate sections of the

PAEA. It would not make sense for Congress to specify that competitive products be regulated if it intended for such programs to be terminated in the first instance.

It is also contrary to everyday usage to conclude that the term “public need” includes the needs of the Postal Service’s competitors. After all, what is in the best interests of consumers and users of the mail may not necessarily be in the best interest of the Postal Service’s competitors. For instance, it is in the best interests of consumers and users of the mail to have more convenient access to Postal Services where people live, work, and shop, but obviously this is not in the best interests of Federal Express or United Parcel Service as achieving this objective may result in their losing sales.

4. Licensing Mailing and Shipping Products Serves an Important Public Need Because it Allows the Postal Service to Communicate with Consumers

From a policy perspective, it is also important, and in the public interest, that the Postal Service have the ability to license its brand on mailing and shipping products. First, licensing is an important revenue generating tool for the Postal Service with minimal attendant costs and no capital investment requirements. As the Postal Service struggles to generate sufficient income to fund its core operations, it seems reckless and unnecessary to deprive the Postal Service of a valuable income generating tool.

Second, it is a customary business practice for large companies with valuable brands to license their intellectual property, and in the context of the Mailing & Shipping program USPS brand licensing provides a number of synergies. For instance, in addition to generating revenue for the Postal Service, licensing helps promote the Postal Service’s brand and promotes the Postal Service’s important goal of shifting away from the high-cost brick-and-mortar retail post office to privately-operated CPUs, kiosks, and Village Post Offices. Through appropriate licensing arrangements, the

Postal Service can generate free advertising and can educate consumers about new postal programs and mailing outlets (both publicly and privately operated). For example, as part of the Mailing & Shipping program the Postal Service could partner with a private party to print on mailing and shipping boxes information about the new Village Post Offices or could advertise a promotional program. A box could advertise: “Mail this Box Anywhere in the United States With the USPS for \$7.95” or “Mail This Box With the USPS By December 20 And It Will Arrive In Time For the Holidays” or “This Box May Be Mailed in the Postal Kiosk Located in This Store’s Lobby.” As the Postal Service seeks to dramatically reinvent its business model in order to avert financial crisis, it is important to keep all channels of communication with postal customers open, and the ability to use the USPS brand in connection with other messages on mailing and shipping supplies creates an important and virtually cost-free mechanism of communication for the Postal Service.

Even without any accompanying promotional messages, just placing the USPS brand on mailing and shipping supplies in non-postal retail outlets helps change the mindset of consumers that it is necessary to travel to a retail post office and to wait in line in order to mail a box. As LePage’s noted in its earlier submissions, a May 14, 2010 *USA Today* survey found that visiting a retail post office is one of the tasks the public likes least. *Declaration of Sunir Chandaria*, ¶ 46. Given the Postal Service’s professed desire to shift more of its operations to private parties, such as through the Village Post Office, it seems reckless to terminate a virtually cost-free program that can assist the Postal Service in attempting to change the public’s mindset about how to access the mailstream.

Third, licensing of the USPS brand can help promote the efficiency of the Postal Service's operations by indicating on boxes "approved by the USPS" or "this box may be mailed in a postal kiosk," or messages to that effect. Indeed, only through a licensing program can the Postal Service exert influence over the size, shape, and design of mailing and shipping supplies. As noted earlier in these comments, under LePage's License, the Postal Service "control[s] the nature and quality of all products or services offered for sale under [the] Agreement, the appearance and use of the Licensed Properties, and the appearance and use of all advertising and promotion for the Licensed Articles and/or the Licensed Properties." License Agreement, Exhibit B, Section 5. The Postal Service also has the right to approve all items before they are sold. See *id.*, Exhibit D. Without these contract rights, the Postal Service would have no ability to influence or control the character of LePage's mailing and shipping products. And by letting consumers know that the box being sold is either endorsed or approved by the Postal Service, customers will be more comfortable using privately-operated postal outlets, such as postal kiosks and Village Post Offices. As the Postal Service explained to the Commission, "[t]he ability to influence behavior in [nonpostal retail] locations, through materials such as the branded products at issue here, is of particular importance as the Postal Service and other parties explore ways to encourage consumers to access postal services in these other locations." USPS Motion for Reconsideration of Order No. 392 dated July 16, 2010, at 6-7.

5. The Commission Must Reopen the Record Prior to Finding That There is No Public Need for the Mailing & Shipping Program

In *LePage's*, the Court rejected the Commission's findings in the Phase II Order that there were insufficient public benefits for the Mailing & Shipping program, given the

Commission's findings that there were sufficient public benefits for both licensing generally and for the OLRP program. The Court held, "the evidence the Commission relied on for the benefits of the commercial licensing program - a statement from the Service's manager of licensing - did not distinguish between different types of commercial licensing. ***The Commission does not explain how it can read the same evidence differently when applied to different aspects of the same program.***" *Id.*, 642 F.3d at 232 (emphasis added). On remand, the Commission must either: (a) find that the Mailing & Shipping program satisfies the "public need" test because the Commission already found that licensing generally and the OLRP program specifically satisfy that test (given that the evidence in the record applies equally to all three services); or (b) reopen the record and seek to develop evidence to determine whether there is a valid basis to differentiate between different types of licensing programs, such as the OLRP ancillary services program and the Mailing & Shipping program. The Commission cannot, however, find that the Mailing & Shipping program does not satisfy the "public need" test on the existing record because such a finding would not be supported by "substantial evidence."²⁵ See, e.g., *Cross-Sound Ferry Servs., Inc. v. ICC*, 738 F.2d 481, 485 (D.C. Cir. 1984) ("Because the Commission acted with insufficient evidence before it and failed to gather needed facts, we vacate [its] decision ... as arbitrary and capricious and unsupported by substantial evidence."); *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) (granting petition for review where "FERC has cited *no* complaints and provided *zero* evidence of actual abuse

²⁵ "Substantial evidence 'means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established.'" *Morall v. DEA*, 412 F.3d 165, 176 (D.C. Cir. 2005) (citations omitted).

between pipelines and their non-marketing affiliates.”). *Cf. Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (“[w]here an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation **and substantial evidence in the record**, its action is arbitrary and capricious and cannot be upheld.”) (emphasis added). In other words, the existing record simply does not permit the Commission to conclude that the Mailing & Shipping program does not serve the public need, but that licensing generally and the OLRP program do.

Moreover, earlier in this proceeding LePage’s submitted evidence concerning the postal kiosk pilot program it is currently involved in. LePage’s explained that in January 2010 the Postal Service approved a program involving the deployment of numerous self-service mailing and shipping kiosks in select Target stores. See USPS Motion for Reconsideration of Order No. 392 (July 16, 2010), at 7; Declaration of Sunir Chandaria, ¶ 42. Currently, approximately 70% of the postal services available at a retail post office are also available at these self-service kiosks. A similar program was also implemented at Duane Reade drug stores. See *id.*, ¶¶ 42, 44. As part of these pilot programs, LePage’s places its USPS-branded mailing and shipping supplies next to or adjacent to the kiosks. *Id.*, ¶ 39. A customer who visits one of these kiosks can then purchase a USPS-branded shipping container and related supplies (such as tape and bubble wrap), package an item, weigh the container, purchase postage, and then drop the package in a secure mail-drop for pick-up by a postal carrier. See *id.* The fact that the shipping supplies sold adjacent to these kiosks bear the USPS brand gives

customers assurances that the supplies they are using meet the USPS's requirements and will be supported by the kiosk.

Through this program, the Postal Service is able to offer "virtual" post offices that can be available 24 hours a day where consumers live, shop, and work. As discussed earlier in these comments, expanding access to postal services where consumers live, work, and shop, and privatizing these services, are key elements of the Postal Service's future transformational goals. Initial results of the pilot programs indicate that the kiosks are being embraced by postal customers. See *id.*, ¶ 43. Interestingly, data shows that a significant amount of usage at these kiosks takes place between the hours of 5:00 p.m. and 8:00 a.m., when most retail post offices are closed. See *id.* Customer survey data further shows that consumers prefer using these retail-based self-service kiosks to visiting a post office. LePage's plans to significantly expand the market penetration of these kiosks over the next four to five years. See *id.*, ¶ 48. This expansion will provide postal customers with more convenient access to postal services, and will benefit the public by generating additional royalty payments to the USPS under the License Agreement and by increasing the volume of the mail.

LePage's previously submitted evidence concerning the benefits of these kiosks but the Commission deemed the submission untimely and refused to consider it. Since LePage's filed its prior submission, it has continued to run pilot programs testing the postal kiosk program, and it believes that the results of those pilot programs show that the Mailing & Shipping program serves an important public need. If the Commission is not convinced that the existing record adequately shows the public need for the Mailing

& Shipping program, then LePage's requests the opportunity to submit additional evidence addressed to this issue.

C. THE PRIVATE SECTOR CANNOT MEET THE PUBLIC NEED FOR LICENSING THE USPS BRAND FOR USE ON MAILING & SHIPPING SUPPLIES

The Commission is bound by the Court's decision in *LePage's* that the "private sector" portion of the PAEA inquiry (Section 404(e)(3)(B)) is satisfied with regard to the Mailing & Shipping program, and thus there is no need to reopen proceedings in this regard. In *LePage's*, the Court made clear that the Commission acted in an arbitrary and capricious manner not just because it changed course from its prior findings in the Phase I Order, but also because its construction of the PAEA did not comport with the text of the statute. In the Phase I Order, the Commission held that, "[a]side from generating revenues, which make a contribution to institutional costs, benefiting mailers and supporting the Postal Service's universal service obligation, the Postal Service's licensing program promotes and gives recognition to its brand. Thus, ***the Commission finds licensing serves the public need which, given the uniqueness of the activity, can not be met by the private sector.***" *Id.* at 73 (emphasis added). In *LePage's*, the Court held:

In Phase I, the Commission held that commercial licensing could not be met by the private sector because no entity other than the Service could license its intellectual property. In Phase II, however, the Commission changed course, explaining that other entities were able to provide substitutes for the licensed mailing and shipping *products*. In other words, the Commission altered its analytic frame from the activity the Service engaged in to the products that resulted from that activity....

Nor, in fact, do we see how the Commission could adopt the position it does in its Phase II Order. As we discussed ... under the Act, the Commission must assess the activity the Service offers. In the case of commercial licensing - whether for mailing and shipping supplies or for other products - that activity is licensing. Therefore, for the Commission to

review the private sector factor by assessing ability of the private sector to provide similar products would bring the Commission into conflict ... with the Act.

Id., 642 F.3d at 233-34. Because the Court defined the service that must be reviewed under Section 404(e)(3)(B) to be *licensing*, and because licensing by the Postal Service of its brand is, by definition, an activity that cannot be provided by the private sector (both as the Commission previously found and as logic and reason dictate), then the “private sector” factor must be found to be satisfied with regard to the Mailing & Shipping program.

In the Remand Order, the Commission poses the following question, “in considering the private sector’s ability to meet the need for Postal Service licensing of its intellectual property for use on third-party consumer goods, is it appropriate to take into account the purpose of licensed consumer goods, *e.g.*, items, such as [] hats, toys, or key chains, that primarily serve a promotional (or novelty) purpose[] versus items related to Postal Service areas of expertise, such as postage meter ink cartridges or mail preparation supplies, that primarily service a public purpose?” *Id.* at 5. In other words, in performing the inquiry required by Section 404(e)(3)(B) (“the ability of the private sector to meet the public need for the service”) may the Commission differentiate between promotional and commercial items? This question was already answered by the Court in the *LePage’s* decision where the Court expressly acknowledges the commercial versus promotional distinction and concludes that this distinction may not impact the “private sector” analysis because, under either program, the core activity involved is licensing. See *id.*, 642 F.3d at 233 (“[i]n the case of commercial licensing - ***whether for mailing and shipping supplies or for other***

products - that activity is licensing”) (emphasis added). The Commission may not, therefore, seek to draw a distinction between commercial and promotional licensing in its proceedings on remand in conducting either the “public need” or the “private sector” analysis because that distinction has already been found by the Court to be immaterial.

There is also no way to draw a reasoned distinction, with regard to the “private sector” test, between licensing for commercial products and licensing for promotional products because the required focus is on the public need for the service the Postal Service is providing, not the public need for the *end product*. Thus, if the Commission concludes that the “public need” being served by “promotional licensing” is enhancing the Postal Service’s image, and, through the revenues generated, supporting the Postal Service’s core mission (Phase I Order at 49-50), then what the Commission must assess in Section 404(e)(3)(B) is the ability of the private sector to meet *this* public need. Where the Commission erred in the Phase II Order, as found by the Court in *LePage’s*, is that, in conducting the Section 404(e)(3)(B) inquiry, the Commission read the term “public need for the service” to mean “the public need for mailing and shipping supplies.” The Court found that this reading was incorrect because the focus must be on the *service* being offered by the Postal Service (*i.e.*, licensing). See *LePage’s*, 642 F.3d at 233-34. And since the Commission cannot reasonably find that the public sector, through the sales of non-branded or privately (*e.g.*, 3M) branded mailing and shipping supplies, is able to effectively enhance the Postal Service’s image and support the Postal Service’s core mission, then the Commission cannot find that the private sector can meet the public need for commercial licensing.

In sum, because the only “service” the Commission may consider when evaluating the Mailing & Shipping program under the “private sector” inquiry, consistent with the Court’s Order in *LePage’s*, is licensing, and because the Commission has already found that licensing of the Postal Service brand is a service that cannot be met by the private sector, the Commission must conclude that the Mailing & Shipping program satisfies the “private sector” test.

CONCLUSION

The Court in *LePage’s* found that the Commission “has much work to do on remand remedying the abundant inconsistencies in its order.” *Id.*, 642 F.3d at 234. This is only the case, however, if the Commission continues to attempt to draw unsupported distinctions merely to permit the ReadyPost, Greeting Card, Customized Postage, and OLRP programs to continue, while requiring the Mailing & Shipping program to terminate. If, on the other hand, the Commission recognizes - as it should - that the Mailing & Shipping program is simply not sufficiently different in the benefits it provides (or in its claimed disadvantages) from those other programs to merit being singled-out for differential treatment, then the Commission’s task on remand is simple - it can allow the Mailing & Shipping program to continue based on its prior settled findings, either on the ground that the program is a “postal service” or on the ground that it satisfies the “public need” and “private sector” tests.

Respectfully submitted,

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